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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

NO. 17

ROBERT J. BUTLER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

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To The Honorable The Chief Justice and Associate Justices Of The Supreme Court Of The United States:

ROBERT J. BUTLER, herewith respectfully petitions this Honorable Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit which was rendered in this cause on May 27, 1966, affirming the conviction of Petitioner upon his plea of guilty on two counts charging violations of 26 United States Code 7203 with knowingly and wilfully failing to register with the District Director of Internal Revenue and to pay the special tax imposed by 26 United States Code, Section 4411, while being engaged in the business of accepting wagers.

OPINIONS BELOW

The District Court did not render an opinion but rendered judgment based upon a plea of guilty to the above two counts. A third count was dismissed after said plea was accepted. The opinion of the Court of Appeals for the Fifth Circuit, comprising Appendix A, infra, is not yet officially reported. Its judgment and that of the District Court are made a part hereof, and the denial of the Motion for Rehearing, on July 29, 1966, is attached as Appendix B.

JURISDICTION

This matter involves the interpretation and application of important substantive and procedural matters of Federal Criminal Law. The judgment of the Court of Appeals for the Fifth Circuit was entered on May 27, 1966. The jurisdiction of this Honorable Court is invoked under Section 1254 (1) of Title 28, United States Code.

QUESTIONS PRESENTED

Petitioner's Application for certiorari presents the following questions of law:

1) Does a conference between Internal Revenue Service Special Agents and Petitioner and a Co-Defendant without the presence of their attorney but at their request after arraignment and prior to trial, at which certain promises were made inducing pleas vitiate all subsequent proceedings which resulted in the pleas of guilty being entered?

2) Does a District Court err in accepting a plea of guilty induced in part by Petitioner's reliance upon

promises made to him by Special Agents of the Internal Revenue Service and over his attorney's objection and with full disclosures to the District Court prior to the acceptance of the plea?

3) Does a Trial Court err in overruling Petitioner's Motion to Inspect and Examine Probation Reports where said reports were the only source of confirming whether in fact agents of the Internal Revenue Service had or had not conferred with the District Judge as they promised Petitioner they would do, and which in part induced his plea of guilty?

The Court of Appeals for the Fifth Circuit, without discussion, Per Curiam held all of Petitioner's contentions in these regards without merit. Further, the Court of Appeals impliedly approved said unilateral conferences between accused and accusing agents without the presence of or dismissal, or conferring with or knowledge of Petitioner's counsel. The Court of Appeals further held that the judgment of the Trial Court "following a plea of guilty made by the Appellant in the presence of his chosen counsel after full and searching inquiry by the Trial Court . . ." was proper.

STATEMENT OF THE CASE

Petitioner in three counts was charged with knowingly and wilfully failing to register with the District Director of Internal Revenue, failing to pay said special tax to the District Director, and failing to make an excise tax return while being engaged with a co-defendant in the business of accepting wagers. He had originally entered a plea of not guilty, but with a co-defendant, after a meeting with the two special agents who had investigated his case and

arrested him, and without his attorney's knowledge, changed his plea in open court. He was thereafter sentenced to imprisonment for a period of one year and fined $2500.00 each on Counts 1 and 2, the imprisonment to run concurrently, and the payment of costs of prosecution also were assessed against him.

Prior to rearraignment the following colloquy took place: At the outset Petitioner's counsel advised the Court of the highly unusual circumstances which had taken place in the interim between the prior arraignment at which pleas of not guilty were entered and the request for rearraignment at Petitioner and his co-defendant's request.

Mr. Morgan: May we next call for arraignment, Your Honor,—this will be re-arraignment—John R. Mayfield and Robert J. Butler, Number 4303-A.

Mr. Schwartz: Your Honor, before going in to this matter, I want to make a disclosure to the Court. My clients have requested this re-arraignment. However, certain events that have been related to me have occurred in the past several months, dealing with the voluntariness, a matter that the Court would normally inquire into. I would like to call not only the clients but the two Government Intelligence agents of the Revenue Service on the point, so that the Court can decide from these facts if in fact a plea can be entered.

As I said, my clients have requested this re-arraignment; and this in no way involves Mr. Morgan's office or Mr. Seals' office. (The respective U. S. Attorneys for the Southern and Western Districts of Texas.) To my knowledge they knew and still know nothing about this other than my possibly mentioning it to Mr. Morgan on the telephone at the time I requested the re-arraignment of the clients.

Mr. Morgan: Your Honor, I think the Court can ascertain from the defendants whether or not they are entering a plea voluntarily. If there's any question about the voluntariness of that plea, I'm sure the Court would enter a plea of not guilty.

Mr. Schwartz: Your Honor, I just don't want the matter to come up later. I think the Court is entitled to know the facts, instead of their coming up, possibly, with a 2255 proceeding later. Since I am counsel for them as well as an officer of this court, I feel duty-bound to disclose this.

The clients, of course, have gone over with me the very matters which the Court and the United States Attorney will inquire about, about the voluntariness of the plea. And while they might answer those questions of the Court satisfactorily, these specific underlying facts deal with those same questions, and I think the Court—it won't take long—I think the Court should be apprised of those matters at this time to determine whether Your Honor can accept a guilty plea.

I realize that this is unusual, and that a lawyer for a defendant asking for a re-arraignment asking to disclose these facts at this time—but I think they should be made a part of the record at this time.

Mr. Morgan: May I be heard, Your Honor?

The Court: Yes.

Mr. Morgan: We would object, of course, to putting on any Government agents to let counsel purportedly prove whether his clients are voluntarily pleading guilty or not so that counsel can be taking their depositions. That's what counsel would actually be doing.

The Court: Well, what I think you ought to do is rearraign them and let the Court satisfy himself on their pleas. Let's get started.

Mr. Schwartz: That was never my intention, Your Honor. This conversation took place, as I am informed, three months ago in the office of the special agents Kelt and Sawyer, who are here in the courtroom today. I requested Mr. Sawyer to be here myself. This conversation occurred between him and my two clients without *my being present*, Your Honor. That is the specific subject matter I'd want to inquire into. Neither Mr. Morgan nor Mr. Seals nor anyone in their offices were involved in any way that I know of.

The Court: Well, if they want to be re-arraigned they can be, and I'll decide whether I'll accept their plea or not.

Mr. Morgan: Sir, is your name Robert Butler?

The Defendant Butler: Yes.

Mr. Morgan: And is your name John R. Mayfield?

The Defendant Mayfield: Yes.

Mr. Morgan: Both of you gentlemen are here in court with your attorney, are you?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

Mr. Morgan: Mr. Schwartz. Have both of you gentlemen been furnished copies of the charge against you?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

Mr. Morgan: Have you had opportunity to discuss this matter with your counsel?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

Mr. Morgan: And you understand, you know what you are charged with?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

Mr. Morgan: Do you understand that you are charged

in a three-count information. In the first count you are charged with failing to register with the Internal Revenue Service, although you were in the business of conducting wagers, in the wagering business. Do you understand that?

The Court: Do each of you understand that?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

Mr. Morgan: And that in Count Two you're charged with failing to pay the special tax levied on those engaged in the gambling occupation. Do you understand that?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

Mr. Morgan: And in the third count, that you are in the business of conducting wagers, and that you failed to make a return and pay the tax, although you were during that time engaged in the gambling business. Do you understand that?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

Mr. Morgan: Do you understand that if you plead guilty to either of these counts or if you're tried and found guilty on either of these counts, the Court can assess a fine of a maximum of $10,000, or one year imprisonment or both the fine and imprisonment. Do you understand that?

Mr. Schwartz: And the costs of prosecution.

Mr. Morgan: And the cost of prosecution on each count. And do you understand that the penalty for either count may be added to the penalty on any other count?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

Mr. Morgan: Do you understand that?

The Court: Well, let's see here; let's be sure. I'm not

sure both answered each time. Now, Mr. Butler, do you understand fully with what you're charged?

Mr. Butler: Yes, sir.

The Court: Mr. Schwartz has advised you of what you're charged, and you have prior to this time seen a copy of the—what is it, an information?

Mr. Morgan: Yes, sir.

The Court: You've seen a copy of the information, and from the explanation Mr. Schwartz has made, you fully understand with what you're charged?

Mr. Butler: Yes, sir.

The Court: And you understand the possible punishment you could receive if you enter a plea of guilty or if on a plea of not guilty you are convicted?

Mr. Butler: Yes, sir.

The Court: Do you have any question about the charge at all, or the punishment?

Mr. Butler: No, sir.

The Court: Mr. Mayfield, do you fully understand what you're charged with?

Mr. Mayfield: Yes.

The Court: And do you understand what the possible punishment is?

Mr. Mayfield: Yes.

The Court: And it's been explained to you by your attorney of your own choice and by the United States Attorney this morning.

Mr. Mayfield: Yes.

The Court: And you received previously a copy of the information?

Mr. Mayfield: Yes.

The Court: Mr. Schwartz, are you satisfied both of them understand fully what they're charged with?

Mr. Schwartz: Yes.

The Court: And the possible punishment?

Mr. Schwartz: They definitely know that.

The Court: All right. You may proceed.

Mr. Morgan: I'll read Count One of the information.

[Thereupon Mr. Morgan read Count One of the information to the defendants.]

Mr. Morgan: To which Count One, you, John R. Mayfield, plead guilty or not guilty?

Mr. Mayfield: Guilty.

Mr. Morgan: To which Count One, you Robert J. Butler, plead guilty or not guilty?

Mr. Butler: Guilty.

[Thereupon Mr. Morgan read the second count of the information to the defendants.]

Mr. Morgan: To which second count, you, Robert J. Butler, plead guilty or not guilty?

Mr. Butler: Guilty.

Mr. Morgan: To which second count, you, John R. Mayfield, plead guilty or not guilty?

Mr. Mayfield: Guilty.

The Court: All right. Mr. Butler, I want you to pay close attention to what the Court asks you. If you have any observation, the Court wants you to make it known. Are you pleading guilty to these counts because you are guilty and for no other reason?

Mr. Butler: Yes, sir.

The Court: Are you pleading guilty because someone has threatened you, intimidated you or coerced you?

Mr. Butler: No, sir.

The Court: Are you pleading guilty because some officer, federal, state, or local, has in any way put pressure upon you?

Mr. Butler: No, sir.

The Court: Are you pleading guilty because someone

has promised you something, favor, inducement, reward, withholding of prosecution?

Mr. Butler: No, sir.

The Court: Now, your attorney has stated that you have had a conversation which may have affected your pleading voluntarily. Have you had any conversation with any officers of the Internal Revenue Service or anywhere else that in any way affected your voluntary plea of guilty?

Mr. Butler: Yes, sir; we've had a lot of conversations. They've only told me that the fact that we plead guilty, *it might be a whole lot easier than trying it; that they've got sufficient stuff on us; in other words, that we haven't got a chance.*

The Court: All right. Now, Mr. Butler, you—

Mr. Butler: And that the Court *might be more lenient with us.*

The Court: Well, now, the Court cannot accept that plea with that understanding that the Court will be more lenient, because you cannot enter a plea of guilty unless you understand fully that you do not have to plead guilty—

Mr. Butler: Well, they cited a few cases for us, you know. They actually didn't promise us anything; I want you to know that. Cases that's come before you in the last year or two, or the last year. And they brought those up with the possibility that there might something along that line happen to us.

Mr. Schwartz: Your Honor, I can name the cases that they refer to, since they were before Your Honor, and since an associate of my office appeared in them at one stage. The cases they mentioned were United States vs. Freddie Harrison and Tommy Stutz, which Your Honor might recall. They were three defendants charged jointly and pled guilty without an attorney, and I think Mr.

Hensley of my office appeared sometime in October of last year. They eventually received suspended sentences without supervision. And that was the specific thing that was mentioned to them, allegedly, Your Honor, by these agents. I want to make it clear, Your Honor, that I have apprised the clients that the Court is bound to no one, not the Government nor us, in any way, and doesn't know of these things in any way; and I think it's improper on the part of the special agents to talk to people who they knew were represented by an attorney for over a year. I've appeared of record for these people, Your Honor, since the date they were arrested, at the Commissioner's hearing, and months later before Judge Allan Hannay of Houston on a motion to suppress, and every proceeding thereafter. And with knowledge of those facts, these agents, without informing me, had these conversations with them. And that is the reason I made the statement I did at the outset, Your Honor. Again I'll repeat that Mr. Morgan's office nor Mr. Seals' office knew anything more than I did about this.

Mr. Morgan: Your Honor, I'm not as familiar, probably, as counsel is about what happened. I think if the Court will inquire he'll find out that these two people went to the Government agents on their own.

Mr. Schwartz: That is correct, Your Honor. They requested the meeting, the conversation, first with Mr. Sawyer at his home and then at their office. That is absolutely correct.

The Court: All right. Now, Mr. Butler and Mr. Mayfield, the Court wants to advise you, first of all, that he cannot accept a plea of guilty from you unless it's voluntary, unless you make it freely and voluntarily. Do you understand that?

Mr. Butler: Yes.

Mr. Mayfield: Yes.

The Court: The Court cannot accept a plea of guilty from you if you're making it because of the conversation had with these agents. Now, the Court's going to advise you that the Court has had other cases besides those to which they have referred, and you'll find that there has been no pattern. The Court does not accept recommendations from either the Government or the United States Attorney's office or the Internal Revenue Service on cases of this nature. He did this morning where somebody violated the Interstate Commerce Act regulations, but he does not in cases of this nature. Therefore, if you're relying in any way upon any statement made to you by these officers in entering a plea of guilty the Court cannot accept it. As a matter of fact, the Court's going to advise you and advise you very carefully that he's had a number of cases of this nature, and the cases since then have not been handled in that manner. The Court, very frankly, in that case you mentioned today, had just come here—the Court's going to be very frank with you—the Court had just come here and had never handled a case of that sort, and thought that a fine with a year was too long, and changed his mind about it. But he has not done it since. The Court found out that by reason of that action that in every case of this nature that's come up the defendant thought that if he had followed the same course he'd get a change in his sentence, so the Court's been very careful to pronounce sentence after studying a probation officer's report and being sure that that is what the report indicated he should do. So the Court wants to advise you that your plea must be voluntary, that if you're relying upon anything that any officer has told you, he cannot accept

your plea, whether it's a promise or a threat or any pressure at all. Now, do you understand that, Mr. Butler?

Mr. Butler: Yes, sir.

The Court: Do you understand that, Mr. Mayfield?

Mr. Mayfield: Yes.

The Court: If you're relying upon any suggestion to you that this Court would be any more lenient with you if you enter a plea of guilty than if you were found guilty after entering a plea of not guilty, the Court cannot accept your plea. Do you understand that?

Mr. Butler: Yes.

Mr. Mayfield: Yes, sir.

The Court: All right. Now, the Court has advised you. Do you fully understand what the Court's saying? Mr. Butler, do you understand the Court will not accept a plea of guilty from you if you're relying upon any promise made to you by anybody? Do you understand that?

Mr. Butler: Yes, sir.

The Court; Or any suggestion to you. Are you relying on the suggestion to you that the Court would be easier on you?

Mr. Butler: No, sir. I understand.

The Court: Alright. Now, I'm going to ask you some questions. I want you to answer me honestly now, because the Court's going to make a determination right now whether you fully understand and are competent, because if later on you want to do something about it—the Court thinks you're competent to understand. No question about that, is there?

Mr. Butler: None whatever.

The Court: All right. The Court's going to give you every opportunity now to answer these questions. All right, Mr. Butler. Do you plead guilty freely and voluntarily of your own free will?

Mr. Butler: Yes, sir.

The Court: Do you plead guilty because you are guilty of what you are charged with?

Mr. Butler: Yes, sir.

The Court: All right. Do you plead guilty because of a promise made to you by anybody connected with the Government?

Mr. Butler: No, sir.

The Court: If there has been such a promise, do you plead guilty realizing that that promise means nothing?

Mr. Butler: No, sir.

The Court: I mean you realize the promise means nothing.

Mr. Butler: Yes, sir, I understand.

The Court: Are you pleading guilty because somebody has threatened you or intimidated you or coerced you in any way?

Mr. Butler: No.

The Court: Are you pleading guilty because of an indication that this Court would be easier on you or would follow the history of some other case?

Mr. Butler: No.

The Court: If that suggestion was made to you, do you realize it will be of no benefit to you?

Mr. Butler: Right.

The Court: And disregarding this, you plead guilty in view of the warning given you by this Court?

Mr. Butler: Yes, sir.

The Court: All right. Is there any pressure, direct or indirect, by anybody, the Government, the lawyer, or anybody else, that's leading you to plead guilty?

Mr. Butler: No, sir.

The Court: Now, Mr. Butler, are you pleading guilty voluntarily and of your own free will?

Mr. Butler: Yes, sir.

The Court: With full knowledge of what the Court has pointed out to you?

Mr. Butler: Yes, sir.

The Court: And regardless of any suggestions, promises, or threats anybody has made to you?

Mr. Butler: Yes, sir.

The Court: All right. The Court's going to accept your plea, Mr. Butler, and finds you guilty as charged.

Mr. Mayfield, are you pleading guilty voluntarily and of your own free will?

Mr. Mayfield: Yes.

The Court: Are you pleading guilty because you are guilty?

Mr. Mayfield: Yes.

The Court: Are you pleading guilty because of some suggestion, promise, or indication made to you by an official of the Government that this Court would be easier on you?

Mr. Mayfield: No.

The Court: Or that he'd follow this history of some other case?

Mr. Mayfield: No.

The Court: What is your answer?

Mr. Mayfield: No, sir, I'm not. No indication.

The Court: All right, sir. Are you pleading guilty because of some pressure, direct or indirect, in some other prosecution or in this one?

Mr. Mayfield: No, sir, no pressure, not any place. I'm pleading guilty because I am guilty.

The Court: And you understand what the Court has pointed out to you?

Mr. Mayfield: Yes, sir.

The Court: All right, Mr. Mayfield. The Court accepts your plea and finds you guilty as charged.

As is the Court's custom, the Court will study the probation officer's report and will call you back for sentencing and give you an opportunity to make any representations to the Court before sentencing.

Now, Mr. Schwartz, do you have any further recommendations to make to the Court?

Mr. Schwartz: No, Your Honor. Any other facts related to me would be accumulative of the ones already related to the Court.

The Court: Are you fully satisfied with the caution that the Court has given the defendants?

Mr. Schwartz: Yes, sir. I don't see how anything more can be done.

The Court: All right.

(R. 210-226)

Thereafter a motion for a new trial and to set aside guilty pleas and motion to suspend the sentence were filed on June 23, 1965 (R. 335-339), and overruled (R. 331). The testimony of Petitioner Butler was in virtual direct conflict with that of the two special agents except on the following pertient points. That on the night of February 23, 1965, that he and co-defendant Mayfield had met with Special Agents Sawyer and Kelt in the latter's office, Room 5308 New Federal Building, Houston (R. 290). Mayfield instigated the call (R. 290, 242) because Mayfield was "nervous and upset and had been unable to work with this charge hanging over his head . . ." (R. 243-290)

Sawyer was not in when the message was left, but returned the call and Butler answered it and the meeting was arranged for that evening at the Federal Building.

The Agents' testimony that they were there without their attorney is undisputed (R. 243). Butler acknowledged his attorney was not there (R. 295) and did not know in advance that his clients were going there. (Page 300).

Mayfield, testified in the wake of a probated sentence, "I appreciate the Court's leniency to me and that my action in the future and conduct prove that" (R. 270). He acknowledged that both he and Butler were reluctant to tell their own attorney what went on at the meeting and hesitated to tell him about it (R. 283).

Other than the duration of the meeting (20-30 minutes) (R. 272, 248) there was a complete divergence of opinion on the following critical matters with Mayfield's memory largely failing him, e.g. (R. 271-282).

Butler amplified upon the matters about which the Court had been earlier advised prior to rearraignment, including the following: Three prior cases in which guilty pleas had been entered and jail terms given in the morning but probated that evening by the same then District Judge were mentioned, Gilliam, Harrison and Stutz. (Although Sawyer did acknowledge that Butler asked about the latter two) (R. 244).

According to Butler they advised him that these three Defendants only got "a fine and one year non-reporting probation." (R. 291). They did not mention any case where time to serve had been imposed under a 7203 case including specifically the case of James J. French (R. 291-292).

Sawyer, after citing these cases, said, "In all likelihood, since we are first offenders (sic), this is what we could

get. I mean likely, in all likelihood that's what we would get, and then we went on talking about A&M which both of the Agents are from." (R. 292).

Butler knew Agent Kelt, who had caddied for Butler and Kelt's father (R. 293). Agent Sawyer advised them that they had no chance to beat their case (R. 293).

Agent Kelt advised that he had become a lawyer on account of the District Judge sitting and that he, when requested to do so by Butler, would give the Judge a good character reference, that he had always been a good citizen of College Station and so on (R. 294).

The Agents, concluding, reiterated, "We haven't promised you anything, but you know you can look at these cases and tell that first offenders, they are rather lenient with them." (R. 294). Although Butler, semantically mistaking what is a promise and what is not in acknowledging that no promises were made (R. 311), was placed under a hypnotic Svengali trance by the following irresistible inducements in addition to those above: That Gilliam and Stutz had said something to him about Sawyer making them similar promises (R. 295), which later turned out to be true.

Sawyer further represented that Defendants would not have to plead to over two, and possibly only one Count (R. 296). The former turned out to be true (R. 232). He and Sawyer took each other into their confidence (R. 296).

He relied on what Sawyer and Kelt told him in deciding to plead guilty (R. 299). On cross examination Butler admitted that he was "not exactly telling the Court the

truth at the time of his arraignment" (R. 303) but in explanation he felt "like that I was the first offender, going back to this meeting, that I certainly wouldn't be put in jail" (R. 304). Even as the United States Attorney repeated verbatim the colloquy supra, at the time of the rearraignment, the appellant related "it was in the back of my mind it would still be all right" (R. 307). He still remembered these conversations and hoped that what they said was going to be true (R. 309). His hope was based upon the conversation and conference of February 23, with the agents (R. 318-319). Appellant and his co-defendant had been advised that they had possible defenses, that their counsel was recommending trial and was not in fact charging any additional fee for the trial (R. 297).

The Agents denied and contradicted most if not all the latter statements by Butler.

After the overruling of Petitioner's First Motion to Reduce or Suspend Sentence the day after imposition of sentence, he thereafter filed Motion to Inspect and Examine the Probation Department reports (R. 350-351), which was overruled on August 11, 1965 (R. 354).

Motions for the return of property illegally seized and/or to suppress same originally filed in Houston, Texas, the place of seizure on December 20, 1963, were likewise filed on June 27, 1964, in the Western District, Austin Division (R. 166, et seq., 192-193). Except for the contents of a safety deposit box containing $13,000.00 in currency, Petitioner's Motion to Suppress was overruled on March 25, 1964 (R. 193, 194). After the overruling of Motion for New Trial and to set aside guilty pleas and to reduce or suspend sentences, supra, Notice of Appeal was duly perfected.

REASONS FOR GRANTING THE WRIT

Over 90% of the criminal cases brought in the Federal Courts are ultimately disposed of upon pleas of guilty.* The meeting between Internal Revenue Service's Special agents and defendants, even if at the latter's request is illegal, unethical, and should be condemned. This is doubly apparent when offers to give the sentencing judge a good character reference on Petitioner (R. 294), of his purported leniency with first offenders of which Petitioner was one (R. 294) and the promise which was ultimately fulfilled that he would not have to plead to the third count (R. 296, 232) are inconsistent with due process of law and are a sporting theory of justice or injustice.

Although the Special Agents knew that Petitioner and his co-defendant had been represented by the same counsel since the hour after their arrest at the Commissioners' hearing, and at the prior arraignment in the United States District Court, they disregarded this in readily accepting Petitioner's request to confer with him in their offices in the Federal Building at night. Both Petitioner and his co-defendant, were nervous, unable to sleep at night and worried (R. 279, 271, 233).

In addition, after the promises of the Agents were not fulfilled, Petitioner through his counsel resorted to the only avenue available to determine whether or not one particular promise, that of the sentencing Judge being given a good character reference on Petitioner was fulfilled. Petitioner does not submit that generally and unlimitedly a Defendant in a criminal proceeding in the United States District Court

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*See e.g. Annual Report of the Federal Bureau of Investigation J. Edgar Hoover, dealing of course with cases on which the FBI has jurisdiction, which comprise a good portion of federal cases.

is now entitled to see carte blanche and meet and refute evidence contained in a probation report and concedes that hearsay and otherwise inadmissible testimony may be contained therein. However, this is a different matter from the District Court denying Petitioner and his Attorney access to the report and records from the Probation Report to see if in fact the promise of the Agent was fulfilled.

These holdings, it is respectfully submitted, are either in direct conflict with or misinterpret the decisions or principles emanating from this Honorable Court, particularly in the past decade. They are novel questions vital to the proper administration and adjudication of Federal Criminal Law, because they are present in the overwhelming number of cases.

MISINTERPRETATION OF SUPREME COURT DECISIONS

With respect to the determination that Petitioner's plea was voluntary, the principles and language enunciated by this Court in *Walker v. Johnston*, 312 U.S. 275, 286, 61 S.Ct. 574; *Shelton v. United States*, 356 U.S. 26, 78 S.Ct. 563; as well as the decision originally enunciated in that case below, *Shelton v. U.S.*, 242 F.2d 112, after which the Solicitor General of the United States confessed error to the majority opinion, at 246 F.2d 571 of the Court of Appeals for the Fifth Circuit sitting en banc while the case was pending in this Court.

With respect to the request for the Probation Report the particular issue clearly presented there has not been presented in this Court but is in complete conflict with the decision in *Dillon v. United States*, 307 F.2d, 445 (9th Cir. 1962). It is respectfully submitted that it is not

at variance with the general principles announced by this Court in *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, although Petitioner does not acquiesce that the general principles enunciated therein are now sacrosanct and cannot be reexamined 17 years later in light of the monumental remolding of the principles of due process by this Honorable Court.

THE IMPORTANCE OF THE QUESTIONS PRESENTED

Whether or not a guilty plea should be accepted, especially after full disclosure by the counsel for defendant prior to the Court's accepting the plea of guilty, is one in which form has been allowed to govern in this case rather than the substance. Petitioner, an uneducated bookmaker, unaware of the semantics of the words and ritual being followed, continually and consistently asserted that he was given no promises when in fact, when specifically questioned, did point out the rankest sort of promises made by Agents without his attorney's knowledge or presence, to induce his plea of guilty. As a matter of law no plea of guilty could have been accepted under the circumstances which had arisen in this case. Especially is this so in view of the disclosure by Defendant's counsel that he had valid defenses. By then the urging was too late. He was under the spell of the very persons seeking to prosecute him. Surely this is a most critical stage of the proceedings. Compare *Escobedo v. State of Illinois*, 378 U.S. 478, 84 S.Ct. 1758.

In a State proceeding, this Honorable Court has commendably held that suppression of evidence favorable to an accused upon request violates due process "where the evidence is material either to guilt or to punishment . . .

irrespective of the good or bad favor the prosecution." *Brady v. State of Maryland*, 373 U.S. 83, S.Ct. 1194. Is this requirement at least not equally applicable to the Court itself, especially a United States District Court?

The encroachments upon delicate and valuable constitutional privileges are not subtle in the record of this case. They are of breathtaking proportions. Petitioner sought limitedly to determine if in fact the special agents did what they promised him they would do with respect to putting in a good word for him with respect to his character with the District Court. He relied that they would do so. Yet Butler here is not confronted by the names, identity, or more importantly even the stories, hearsay though they be, of the faceless, nameless citizens of the Probation Department and informers and what they had to say, for or more importantly, against him. This question is now squarely presented for this Honorable Court to decide. See concurring opinion in *Jones v. U.S.*, 362 U.S. 257, 273, 80 S.Ct. 725 (1960).

CONCLUSION

Petitioner respectfully submits that his guilty plea should be set aside because it was involuntary as a matter of law. Further, that assuming such plea to have been voluntarily entered, he had the right to be given the probation report either in its entirety as a matter of constitutional right to confrontation and due process and with which to rebut or confirm the Special Agent's promises to him but is also as a matter of confirmation of the Agent's promises. For either or both of these failure, this cause, it is respectfully submitted, must be reversed and remanded for a new trial, or alternately, for the granting of the motion with respect

to the examination of the Probation Department Report, and resentencing.

Respectfully submitted,

NEWTON B. SCHWARTZ
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that three copies hereof have been served upon the United States of America by mailing them in a duly stamped, properly addressed envelope this 9 day of August, 1966, to Hon. Woodrow Seals, United States Attorney, 515 Rusk at Smith, Federal Building, Houston, Texas, and one copy upon the Solicitor General of the United States, Department of Justice, Washington, D.C.

NEWTON B. SCHWARTZ,
MEMBER OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES.
500 Branard, Houston, Texas
Attorney for Petitioner

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22,774

ROBERT J. BUTLER, *Appellant,*
versus
UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Western District of Texas.

(May 27, 1966.)

Before TUTTLE, Chief Judge, RIVES, Circuit Judge, and CHOATE, District Judge.

PER CURIAM: The judgment of the trial court, following a plea of guilt made by the appellant in the presence of his chosen counsel after full and searching inquiry by the trial court, and the sentence are AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

Edward W. Wadsworth
Clerk

Room 408 - 400 Royal St.
New Orleans, La. 70130

OFFICE OF THE CLERK

July 29, 1966

Re: No. 23055 - Robert J. Butler vs.
United States of America

Gentlemen:

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

EDWARD W. WADSWORTH
Edward W. Wadsworth, Clerk

Mr. Newton B. Schwartz
Attorney at Law
Houston, Texas

Mr. James R. Gough,
Assistant U. S. Attorney
Houston, Texas